United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1907.

No. 1843. 524

WILLIAM BLATCHER, APPELLANT,

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED NOVEMBER 13, 1907.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1907.

No. 1843.

WILLIAM BLATCHER, APPELLANT,

versus

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1907.

In the Court of Appeals of the District of Columbia.

No. 1843.

WILLIAM BLATCHER, Appellant,
vs.
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

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a Supreme Court of the District of Columbia.

At Law. No. 49047.

WILLIAM BLATCHER, Plaintiff,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be is remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

1 *Bill of Particulars.*

Filed January 5, 1907.

In Justice's Court of the District of Columbia, Sub-district No. 5.

At Law. No. 49047.

WILLIAM BLATCHER, Plaintiff,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

To damages sustained by plaintiff by reason of defendant's negligence in furnishing insufficient and defective car to transport plaintiff, his horses and carriages from Washington D. C. to Newport, Rhode Island, as per contract of May 1906. $300.00.

Certified Copy of Justice's Judgment and Proceedings on Appeal.

Filed January 5, 1907.

In Justice's Court of the District of Columbia, Sub-district No. 5.

49047.

No. 13177.

WILLIAM BLATCHER, Plaintiff,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

Date.	Proceedings.
Nov. 22d, 1906.	Summons and copy issued ret. Nov. 27th at 11 a. m. Cont. by deft. to Dec. 15th at
2	*at* 11 a. m.
December 15th, 1906.	Judgment for the plaintiff after trial for $125.00 damages on interest from date with 2.10 costs.
" 17th	Notice of appeal filed ret. Dec. 20th at 10 a. m.
" 26	Appeal bond approved and all papers certified to the Clerk Sup. Court D. C.

I, Lewis I. O'Neal, Justice of the Peace in and for the said Sub-District, do hereby certify that the foregoing is a true copy of the judgment and proceedings in the above-entitled cause.

Given under my hand and seal this 26th day of December A. D. 1906.

LEWIS I. O'NEAL, [SEAL.]
Justice of the Peace.

Costs paid by Plaintiff..... $3.60
Costs paid by Defendant..... .25

3 Filed January 5, 1907.

Philadelphia, Baltimore & Washington Railroad Company.

No. ——.

Uniform Live Stock Contract.

W. D. C. Station. 5/24 1906.

This Agreement, Made this 24 day of May 1906 by and between Philadelphia, Balto. & Wash. R. R. Co., hereinafter called the carrier, and —— —— hereinafter called the shipper.

Witnesseth: That the said shipper has delivered to the said carrier live stock of the kind and number, and consigned and destined by said shipper as follows:

Consignee, destination, etc.	Number and description of stock (shipper's load and count).	Weight, subject to correction.
W. Blatcher, Newport, R. I.....	3 Horses.	
Advances, $—.		
Car Nos. and Initials, P R R. 67358		49047

for transportation from Washington, D. C. to destination, if on said carrier's line of railroad, otherwise to the place where said live stock is to be received by the connecting carriers for transportation
4 to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation, subject to the official tariffs, classifications and rules of the said company, and upon the following terms and conditions, which are admitted and accepted by the said shipper as just and reasonable, viz:

The said shipper or the consignee is to pay freight charges thereon to the said carrier at the rate of —— per —— which is the lower published tariff rate, based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier, nor any connecting carrier. shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers, or their employees or otherwise.

If Horses or Mules—not exceeding.....	$100.00 each
If Cattle or Cows—not exceeding.....	75.00 each
If Fat Hogs or Fat Calves—not exceeding.....	15.00 each
If Sheep, Lambs, Stock Hogs, Stock Calves, or other small animals—not exceeding	5.00 each

and in no event shall the carrier's liability exceed $1200 upon any car load.

[Stamped upon the face:] Rel. & Valued @ 100.00 each—1 Man in chg.

That said shipper is to pay all back charges, and freight charges paid by said carrier or connecting carrier upon or for the transportation of said live stock.

That the said shipper is at his own sole risk and expense to load and take care of, and to feed and water said stock whilst be-
5 ing transported, whether delayed in transit or otherwise, and to unload the same, and neither said carrier nor any connect-

ing carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself that they are sufficient and safe, and in proper order and condition, and said carrier or any connecting carrier shall not be liable, on account of any loss of or injury to said stock, happening by reason of any alleged insufficiency in, or defective condition of, the body of said car or cars.

That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said car or cars.

The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock, occasioned by any or either of the following causes, to wit: overloading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold or by changes in weather, or for delay caused by stress of weather, by obstruction of track, by riots, strikes, or stoppage of labor, or for causes beyond their control.

That in the event of any unusual delay or detention of said
6 live stock, caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock, while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the —— —— agent of the said carrier at his office in —— within five days from the time said stock is removed from said car or cars and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs.

That whenever the person or persons accompanying said stock under this contract, to take care of the same, shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier nor its connecting carriers shall be required to stop or start their trains of caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock, to take care of the same under this contract.

7 And it is further agreed by said shipper, that in consideration of the premises, and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers, without charge other than the sum paid or to be paid for the transportation of the live stock, in charge of which he is, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employees, or otherwise.

And —— do — hereby acknowledge that —— —— had the option of shipping the above-described live stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers, and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies, as common carriers of the said live stock, upon their respective roads and lines, but ha- voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned.

PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY,
By W. W. BOWIE, *Station Agent.*

Witness my hand,

WM. BLATCHER, *Shipper.*

R. TULFORD, *Witness.*

8 *Release for Man or Men in Charge.*

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock —— in charge, the undersigned does hereby voluntarily assume all risk of accidents or damage to his person or property, and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.

WM. BLATCHER,
Signature of Man in Charge.

R. TULFORD, *Witness.*

9 *Memoranda.*

December 17, 1906.—Notice of appeal from Judgment of Justice of the Peace by Defendant.

December 20, 1906.—Appeal Bond,—filed.

June 3, 1907.—Verdict for Defendant.

Supreme Court of the District of Columbia.

WEDNESDAY, *June* 12*th*, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

Before Judge Barnard.

No. 49047. At Law.

WILLIAM BLATCHER, Plaintiff,
vs.
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Defendant.

It appearing that under the Rule of Court, judgment on verdict should be entered herein, it is so ordered; thereupon, it is considered and adjudged, that the plaintiff herein take nothing by this
10 action, that the defendant go hereof without day, be for nothing held and recover of plaintiff the costs of defense to be taxed by the Clerk, and have execution thereof.

Memoranda.

June 17, 1907.—Appeal noted and penalty of bond fixed.
July 2, 1907.—Appeal Bond,—filed.
July 8, 1907.—Bill of Exceptions submitted to Court.

Supreme Court of the District of Columbia.

TUESDAY, *October* 29*th*, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

By Judge Barnard.

No. 49047. At Law.

WILLIAM BLATCHER, Plaintiff,
vs.
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Def't.

The bill of exceptions hereto submitted to Court being
11 signed this day, it is ordered that the same be, and hereby is made of record now, as of the time of noting thereof at the trial.

Bill of Exceptions.

Filed October 29, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49047.

WILLIAM BLATCHER

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation.

The jury having been sworn in the above entitled cause to truly try the issues joined therein, the plaintiff to maintain the issues on his part joined, gave in evidence the following testimony:

WILLIAM BLATCHER, the plaintiff in the case, having been duly sworn, testified as follows, that he is the proprietor of a livery stable in the city of Washington; that in May 1906 he made a contract with the Philadelphia, Baltimore and Washington Railroad Company to convey certain horses and carriages, and himself in charge of the same, from Washington D. C. to Newport R. Is.; (the contract was offered in evidence by the plaintiff and will be found in the record *in extenso*) that he paid the rate mentioned in
12 said contract and loaded the horses and carriages upon a car assigned to him for the trip by the agents of the railroad company; that when the train arrived at Taunton, Mass. (this station is agreed by counsel for the respective parties to be beyond the line of the defendant's road) the train stopped and the plaintiff got out of the car to get water for the horses; that when he was getting back into the car, he caught hold of a hasp which was hanging down by the side of the car door. threw his leg up on the floor of the car and while in the act of drawing himself up into the car in that way, the said hasp separated from the side of the car and he was thrown down onto the adjoining track. The plaintiff further testified that the floor of the car was about five feet from the ground; that there was no platform level with the floor of the car as there is in Washington; that the hasp which he caught hold of was a piece of iron about ten or twelve inches long and about three inches in width; that it was fastened to the *said* of the door by an iron bolt which passes through a heavy plank forming a part of the door; (that this iron bolt has a thread on the end of it and when in proper order there is a nut screwed to this thread which holds the bolt and hasp securely in place); that he examined the hasp and bolt after the accident and the thread at the end of the bolt had no nut on it and was rusty all along; that he has traveled frequently with stock on cars similar to this one and has gotten on the cars in the same manner that he did on this occasion; that there was nothing but this hasp to

catch hold of, and that he could not get into the car without
13 catching hold of something. The plaintiff also testified as to the injuries which he had sustained by the fall. The plaintiff was also asked if he had seen railroad men and others use hasps similar to this one for the purpose of assisting themselves into the cars. The question was objected to and the objection was sustained. No exception was taken to this ruling.

Whereupon the plaintiff announced that his case was closed.

Whereupon the defendant to maintain the issues on its part joined, called the following witnesses:

JOHN LYNCH, who testified that he was a car inspector in the employ of the Philadelphia, Baltimore and Washington Railroad Company, the defendant; that he was so employed in May 1906; that it was then his duty to inspect all stock cars of the defendant company leaving the freight yard in Washington City from which the car in question had departed and to report any defect therein and that he performed his duties.

On cross examination this witness testified that he did not remember of making any examination of this particular car, nor did he remember making any report of a defect therein and that it would have been his duty to do so, if he had found any defect; that he worked twelve hours per day and examines about fifty cars a day.

The defendant then called CHARLES A. ROSSITER who testified that he was foreman of the defendant's car shop in Washington, D. C.; that he is familiar with hasps similar to the one described in
14 this case; that they are on the cars for the purpose of locking the doors; that they are about ten inches in length, about three inches in width, and are fastened to the door of the car by a bolt one-half inch in diameter, which passes through a board forming a part of said door; that there is a nut on the end of the bolt; that he identified the car in question as being the property of the Philadelphia, Baltimore and Washington Railroad Company.

This is the substance of all the testimony in the case, and at its conclusion, counsel for the defendant moved the court to instruct the jury to return a verdict for the defendant. This motion was granted, and an exception was duly noted to the action of the court by counsel for the plaintiff.

The foregoing exception was duly taken by the plaintiff at the time the jury was instructed upon the whole evidence to return a verdict for the defendant, and was duly noted by the court on its minutes at the time the same was taken.

To the end that justice may be done in the said cause, and that the question raised by the foregoing exception may be reviewed on appeal, the plaintiff prays the court to sign and seal this his bill of exceptions, as and for the time the same was noted; which is accordingly done, now for then, this 29th day of October, A. D. 1907.

JOB BARNARD, *Justice.*

15 *Directions to Clerk for Preparation of Transcript of Record.*

Filed October 29, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49047.

WILLIAM BLATCHER, Plaintiff,

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Defendant.

The clerk will furnish a full and fair transcript of the record in the above cause for appeal to the Court of Appeals, and include therein the following papers, which are agreed by counsel shall constitute the record.

1. Particulars of demand.
2. Judgment.
3. Memo: Notice of appeal.
4. Memo: Appeal.
5. Verdict.
6. Judgment.
7. Memo: Appeal bond.
8. Bill of Exceptions
9. Contract between plaintiff and defendant, (in full) (entitled Uniform Live Stock Contract).
10. This order (in full).

M. F. MANGAN,
For Plaintiff.
WILLIAM HITZ,
For Defendant.

16 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 15 both inclusive, to be a true and correct transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript, in cause No. 49,047 at Law, wherein William Blatcher is plaintiff and the Philadelphia, Baltimore and Washington Railroad Company is defendant as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District this 13th day of November A. D., 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1843. William Blatcher, appellant, *vs.* Philadelphia, Baltimore and Washington Railroad Company. Court of Appeals, District of Columbia. Filed Nov. 13, 1907. Henry W. Hodges, clerk.

In the Court of Appeals

Of the District of Columbia.

OCTOBER TERM, 1907.

WILLIAM BLATCHER, *Appellant*,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILWAY COMPANY, A CORPORATION, *Appellee*.

No. 1843.

Brief on Behalf of Appellant.

M. F. MANGAN,
JAMES B. HORIGAN,
Attorneys for Appellant.

Hayworth Pub. House, Wash D C

IN THE COURT OF APPEALS

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1907.

WILLIAM BLATCHER, *Appellant*,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILWAY COMPANY, A CORPORATION, *Appellee*.
No. 1843.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF FACTS.

The facts, in this case, as disclosed by the testimony contained in the bill of exceptions, are briefly as follows:

The plaintiff contracted with the defendant railroad company to convey certain horses and carriages with himself in charge from Washington, D. C., to Newport, Rhode Island. (The contract is copied in the record, page 2). He loaded the horses and carriages into a car assigned to him for the trip by the agents of the company, and proceeded safely on the journey as far as Taunton, Massachusetts. (A station beyond the terminus of the defendant's road). At that station the train stopped and the plaintiff got out of the car to get water for the horses; in getting back into the car, the plaintiff caught hold of a heavy iron hasp at the side of the door, threw his leg up to the floor of the car and was about to pull himself into the car, when the hasp separated from the door. The plaintiff was thrown down

onto the adjoining track and sustained severe injuries.

The hasp is a heavy piece of iron about three or four inches wide and about twelve inches long; it is attached to the door by an iron bolt one-half inch in diameter which passes through a heavy plank, and, when in order, this bolt is secured by a nut fastened to a thread at the end of the bolt. When examined immediately after the accident, the bolt was found to have no nut on it and the thread was all rusty. The car floor was about five feet from the ground, and there was nothing but this hasp to catch hold of in getting up into the car. It was not possible for the plaintiff to get into the car without taking hold of something to assist him from the ground.

ASSIGNMENTS OF ERROR.

1. The Court erred in holding that the plaintiff was guilty of contributory negligence in law.

2. The Court erred in sustaining the motion of defendant's counsel to instruct the jury to return a verdict for the defendant.

The grounds upon which the Court based these rulings were stated orally, they are as follows:

(a) That the defendant is not liable, because the accident which resulted in plaintiff's injury happened at a place beyond the terminus of the defendant's road.

(b) That the defendant is not liable, because the plaintiff signed a paper purporting to exempt the defendant from all liability for injuries resulting from negligence or otherwise. (Record page 5).

(c.) That the defendant is not liable, because the hasp which the plaintiff used to assist himself into the car, is not primarily intended for that purpose, and its use constituted contributory negligence in law.

ARGUMENT.

(a) That the defendant is not liable, because the accident which resulted in plaintiff's injury happened at a place beyond the terminus of the defendant's road.

It is conceded that if the car in question had gotten beyond the terminus of the defendant's road, and the accident had happened through the negligence of a connecting carrier or of its servants, the plaintiff would have no case against this defendant. He would have no standing in a contract action, because the Supreme Court of the United States has decided that, when freight or passengers are to be carried over connecting lines, the initial carrier does not, in the absence of a special agreement, enter into a contract to transport them safely from the shipping point to their destination, but contracts only to transport them from the shipping point to the terminus of its road and to deliver them safely to the next connecting carrier.

Myrick *vs.* Railroad Company 107 U. S. 102.

He would clearly have no standing in a tort action against this defendant if the car had passed beyond the terminus of the defendant's line, and the accident had happened through the negligence of the servants of the connecting carrier, because this defendant would certainly not be liable for the wrongful act or negligence of the servants of another line; that would be a manifest injustice.

In this case, however, quite a different question arises. The fact that the accident happened, and that the injuries were sustained beyond the terminus of the defendant's line, is wholly immaterial. The act of negligence was committed in the District of Columbia, in giving the plaintiff a car with a defective appliance. Suppose that the defendant had given the plaintiff a car with a hole in the bottom of it, and the plaintiff had failed to notice the hole, and when beyond the terminus of the defendant's line had fallen through and received injuries. It surely could not be con-

tended that the defendant would not be liable, merely because the car had passed off its road.

The duty incumbent upon the defendant in this case was to transport the plaintiff and his horses and carriages to the terminus of its road and to deliver the car to the next connecting carrier safely and without negligence. It did not fulfill this duty because it committed an act of negligence in furnishing a car with a broken and defective hasp, and the fact that injury did not result from that negligent act until the car passed off the defendant's line is no defense. The precise point here involved was decided in the case of

Strain *vs.* Railroad Company 81 Ill. 504.

In that case the plaintiff shipped stock in a car of the defendant railroad company. When beyond the terminus of the defendant's road, some of the stock escaped from the car by reason of a defect in the door. The court held that the fact that the car had passed off the defendant's road and onto the line of a connecting carrier was no defense, as the negligence consisted in furnishing a defective car.

The case of Moon *vs.* Railroad Company 46 Minn. 106, involves the same question and is decided in the same manner. These cases do not differ in principal from the case under consideration.

b That the defendant is not liable, because the plaintiff signed a paper purporting to exempt the defendant from all liability for injuries resulting from plaintiff's negligence or otherwise. (Record page 5).

It is interesting to note the gradual relaxation of the law relating to the common law liability of common carriers. At common law carriers were insurers of goods bailed to them for transportation; they were insurers and only in cases of loss or injury by the act of God or the public enemy, were they relieved from liability.

Hutchinson on Carriers 3 Ed. Sec. 265.

The first deviation from this rule of the common law was when common carriers were permitted to contract for exemption from liability for losses arising from purely accidental causes. Such as loss or injury by fire, theft or mobs, but this exemption can be taken advantage of only when the carrier is guilty of no negligence, and, if the loss is caused by the negligence of the carrier, such a stipulation is of no avail and does not relieve from liability.

Hutchinson on Carriers 3 Ed. Sec. 420.
Hart *vs.* Pa. R. R. Co. 112 U. S. par. 1 page 338.
York Co. *vs.* R. R. Co. 3 Wall. 107.
Bank of Kentucky *vs.* Ad. Ex. Co. 93 U. S. 174.

The second step towards a relaxation of the common law doctrine was when courts held valid, contracts made with common carriers, wherein the shipper and the carrier agreed on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation.

It must be noted, however, that in no case is the carrier permitted to stipulate against negligence. In the first case, the exemption is for liability from injuries resulting from purely accidental causes; in the second, the shipper and the carrier agree on the value of the goods and the carrier is liable only to that extent, no matter how the loss or injury occurs.

Hart *vs.* Pa. R. R. Co. 112 U. S. par. 1 page 338.
Cau *vs.* R. R. Co. 194 U. S. 420.

It is clear that the foregoing relaxations of the common law rule of liability apply only to carriers of goods, and they can have no application to carriers of passengers.

The first exception, wherein the carrier is permitted to stipulate for exemption from liability for injuries through purely accidental causes, could not apply to carriers of passengers because they were never held liable to passengers for injuries resulting from accidental causes. They were liable only for negligence.

The second exception, wherein the shipper and the carrier agree on the value of the property shipped, and the liability is limited to that valuation, could manifestly not apply to passengers.

The inevitable conclusion is that the so-called "release" (record page 5) is purely an attempt to stipulate for exemption from liability for negligence, and is against public policy and void. Carriers of passengers are liable only for injuries resulting from negligence, consequently any stipulation attempting to exempt them from liability is necessarily an attempt to stipulate for exemption from the consequences of his own negligence or that of his servants.

The case of Lockwood *vs.* the R. R. Co. 17th. Wallace 357, is absolutely in point with this case. The conclusions arrived at in that decision are:

1. That a person travelling, as a drover, in charge of stock is a passenger for hire;

2. That all agreements limiting the common law liability of common carriers must be just and reasonable;

3. That an agreement exempting a common carrier from liability for injuries resulting from the negligence, of itself or its servants, is never just or reasonable.

The so-called "release" set up as a defense in the Lockwood case is almost identical with the one (record page 5) here under consideration, and it was decided to be simply an attempt to stipulate for exemption from liability for injuries resulting from negligence. The Lockwood case has not been reversed nor in any way modified or restricted; on the contrary the Supreme Court in the case of Cau *vs.* R. R. Co. 194 U. S. 427, expressly reaffirms the Lockwood case, practically bringing it up to the present time. See also

R. R. Co. *vs.* Teeters 5 L. R. A. (new series) 425.
R. R. Co. *vs.* Selby 47 Ind. 493.

(c) That the defendant is not liable, because the hasp,

which the plaintiff used to assist himself into the car, is not primarily intended for that purpose, and its use constituted contributory negligence in law.

The only ground for this ruling was that the hasp, which the plaintiff caught hold of to assist himself into the car, was intended primarily for the purpose of locking the door, and the act of the plaintiff in catching hold of it constituted contributory negligence in law. The learned Justice in the lower court based his ruling solely on the decision in the case of

McCauley *vs.* R. R. Co. 10th. App. D. C. 560.

The McCauley case is distinguishable from this case in the following particulars:

1. In the McCauley case the plaintiff was an employe of the defendant R. R. Co.; in this case, the plaintiff was a passenger of the defendant road.

2. In the McCauley case, the plaintiff used a number plate for a hand hold, when hand holds were provided; in this no hand hold was provided, the hasp used was the only thing to serve the purpose.

3. In the McCauley case, the number plate was clearly unsuitable for the purpose of a hand hold; in this case, the hasp was clearly suitable for the purpose, had it been in order.

The Plaintiff was a passenger for hire, and negligence would be presumed from the happening of the accident and the consequent injury.

In R. R. Co. *vs.* Chapman 26 D. C. App. 472, the court says:

> "In order to make out a prima facie case, the burden of proof of negligence on the part of the defendant, as the cause of an injury, is upon the plaintiff; but this burden is changed, in the case of a passenger on a railway car, by showing that the accident which

caused the injury occurred while the plaintiff was a passenger. The burden of proof is then cast upon the defendant to explain the cause of the accident, and to show, if that be the defense, that the plaintiff was negligent, and that his negligence caused, or contributed to the production of the injury."

R. R. Co. *vs.* Svedborg 20 App. D. C. 543,
Kehan *vs.* R. R. Co. 28 App. D. C. 108,
Stokes *vs.* Saltonstall, 13 Peters 181.

But it is not necessary to invoke the doctrine of res ipsa loquitur in this case, as the negligence of the defendant was affirmatively proved. An examination of the hasp immediately after the accident disclosed the fact that the thread on the end of the bolt had no nut on it and was rusty all along, indicating that there had been no nut on the bolt for some time. (Record bottom of page 7).

The hasp was a defective appliance, and the defect could have been discovered by a vigilant inspection.

In R. R. Co. *vs.* Roy 102 U. S. 451,

the Supreme Court say: "A carrier of passengers for hire is bound to use the utmost caution, and is responsible to them for such injuries received in their transportation as might have been avoided or guarded against by his exercise of extraordinary vigilance, aided by the highest skill.

Such caution and vigilance extend to all the appliances and means used by him in transporting them. He must, therefore, provide cars or vehicles adequate, that is, sufficiently secure as to strength or other requisites, for their safe conveyance, and he is liable in damages if, by reason of the slightest negligence or fault in that regard, injury results to a passenger."

The plaintiff having proved the negligence of the defendant, it was incumbent on the defendant to prove contributory negligence, as that was the defense relied upon. The

defendant attempted to do this by proving that the broken hasp was primarily intended to lock the door, and the court decided that this constituted contributory negligence in law.

It is not proper for the court or jury to consider one single circumstance, and hold that as controlling; the question of contributory negligence must be determined by a consideration of all the circumstances.

R. R. Co. *vs.* Maugans 61 Md. 61,
R. R. Co. *vs.* Kane 69 Md. 12,
R. R. Co. *vs.* Ives 144 U. S. 408.

Contributory negligence is usually a fact for the determination of the jury, and can only be considered a question of law when all reasonable men would arrive at the same conclusion.

Warner *vs.* R. R. Co. 168 U. S. 344,
R. R. Co. *vs.* Ives 144 U. S. 408,
R. R. Co. *vs.* Griffith 159 U. S. 603,
Jennings *vs.* R. R. Co. 29 App. D. C. 235,
Grant *vs.* R. R. Co. 11 App. D. C. 108,
Chapman *vs.* R. R. Co. 26 App. D. C. 472.

The question of contributory negligence should undoubtedly have been submitted to the jury. The test of contributory negligence is simply whether or not the plaintiff acted as a reasonably prudent man should have acted under similar circumstances.

R. R. Co. *vs.* Jones 95 U. S. 439,
R. R. Co. *vs.* Gentry 163 U. S. 352 p. 368,
R. R. Co. *vs.* Warner 168 U. S. 340,
Strand *vs.* R. R. Co. 64 Mich. 216.

The circumstances of this case are as follows: the plaintiff was obliged by his contract to leave the car to get water for the horses; he was of course obliged to get back into the car after getting out; the floor of the car was more than five feet from the ground; there was nothing but this hasp to use as a hand hold in getting into the car; he was obliged

to catch hold of something; and what appears to be the most important circumstance of all, is that the hasp would have undoubtedly have served the purpose, had it been in order. This is indicated by the size of the hasp, the manner in which it was fastened to the car, the fact that neither the hasp nor the bolt broke, but simply pulled away from the car by reason of its defective condition, and also because the plaintiff testified that he had travelled on these cars frequently and had used similar hasps for the purpose of assisting himself into the cars.

It is difficult to conceive how the court could decide that the plaintiff acted in a negligent or unreasonable manner; indeed it is difficult to see how the plaintiff, under the circumstances, could have acted otherwise than he did.

It is respectfully submitted that the plaintiff was not guilty of contributory negligence, at least he was not guilty of contributory negligence as a matter of law, and the case should be reversed.

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Court of Appeals, District of Columbia.

JANUARY TERM, 1908.

No. 1843.

WILLIAM BLATCHER, APPELLANT,

vs.

THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, APPELLEE.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Statement of Facts.

This is an appeal from a judgment of the Supreme Court of the District of Columbia upon a verdict directed by the trial justice in favor of the defendant below.

The appellant, William Blatcher, entered into a contract (to be found in the Record *in extenso,* pp. 2-5) on May 24, 1906, under the terms of which certain carriages and horses, with appellant in charge thereof, were to be transported by the appellee from Washington, D. C., "to destination, if on said carrier's line of railroad; otherwise to the place where said live stock is to be received by the connecting carriers for transportation to or toward destination," such destina-

tion being Newport, Rhode Island (Rec., 2-3). When the appellant and said shipment reached Taunton, Massachusetts, a point which counsel for the respective parties agree is beyond the terminus of appellee's line of railroad (7), the appellant alighted from the train to obtain water for the horses, and in getting back into the car he threw his leg up on the floor thereof, and instead of catching hold of the side of the car or of the door, he caught hold of a small hasp (7), which was upon the car "for the purpose of locking the doors" (8), and as he threw his weight upon this hasp it pulled out of its fastenings and he fell to the ground (7). These hasps are fastened to the side of the car by an iron bolt which passes through the side of the car, and as the door was open when the appellant attempted to board the car, the loose end of the hasp, which he grasped, was hanging down by the side of the door (7-8).

Under the contract signed by the appellant he agreed to save the appellee harmless from all claims and demands by reason of personal injuries sustained by the person in charge of said stock, and the appellant also signed a release printed upon the back of the contract, under the terms of which he voluntarily assumed all risk of accident or damage to his person, "whether same be caused by the negligence of said carrier or carriers or otherwise" (4-5).

At the conclusion of all of the evidence, upon motion, the trial justice directed a verdict for the defendant. The court stated its reasons orally for granting said motion, referring briefly to the terms of the contract and release, but basing its decision primarily upon the ground that the plaintiff was not entitled to recover because he had been guilty of contributory negligence in using the hasp for a purpose for which it was not intended to be used, citing—

McCauley *v.* Southern Ry. Co., 10 App. D. C., 560.
Brightwood Ry. Co. *v.* Carter, 12 App. D. C., 155.

ARGUMENT.

1. The trial justice did not err in directing a verdict for the appellee. The doctrine of "res ipsa loquitur" does not apply to this case, and the evidence does not show that the appellee was guilty of negligence.

It is conceded that under the decision in the case of Railroad Company *v.* Lockwood, 17 Wall., 357, the appellant in this case was a "passenger for hire," but it is contended that he did not stand upon the same footing, with respect to the application of the doctrine of *res ipsa loquitur,* as the man who buys a first-class passenger ticket, according to the terms of which he is entitled to ride in a first-class passenger coach.

In the case of Weaver *v.* Railroad Company, 3 App. D. C., 436, the plaintiff's intestate was a postal clerk, whose duty it was to catch the mail-bags when passing stations where the train, upon which he was employed, did not stop. He was killed while attempting to catch a mail-bag, by reason of his head coming in contact with a post of a bridge, which was shown to have been built more closely to the track than was customary. The present Chief Justice, delivering the opinion, held (p. 452):

> "Whilst the plaintiff's intestate is to be considered as a passenger, it cannot be presumed, from the mere fact of his having been killed while *en route,* that the injury was caused by the negligence of the defendant. That he was found dead in the car, killed by coming in contact with the bridge post, does not of itself shift the burden of proof to the defendant. The burden is always upon the plaintiff to make out his case. Where negligence furnishes the cause of action it must be proved by the party alleging it. There are some cases in which it has been said that the law

> presumes negligence on the part of the carrier from the mere happening of an accident to a passenger. This is not a strictly accurate statement of the law. The most that can properly be said is that when an injury occurs through some accident to the means of transportation, which is under the management of the carrier's employees and which, if they exercise proper care, cannot ordinarily happen, it affords reasonable evidence, in the absence of explanation, from which negligence may be inferred" (citing cases) * * * "In this case, there was no derailment of the car, no injury to it, or the track, no accident of any kind affecting it, or that could have affected *any passenger inside the cars.* There is no legally established fact upon which to found the presumption or inference of negligence on the part of the defendant. The sole foundation for the inference of negligence exists in the fact that intestate was instantly killed by coming in contact with the post of a bridge which is not as wide as is now customary in the construction of new bridges."

In Western Maryland R. R. Co. *v.* Shirk, 95 Md., 637 (decided in November, 1902), the plaintiff's intestate jumped from a freight car and was killed, the car having been derailed by reason of the breaking of an axle. The plaintiff's intestate was riding on a "drover's pass," and the late Chief Justice McSherry, delivering the opinion, held (p. 647):

> "The deceased was a passenger (*5 Am. & Eng. Encyc. L. (2d ed.), 508, and note 5*). He was not, however, entitled to the same absolute and extraordinary degree of care as to his safety which a common carrier is bound to exercise towards a traveler on a regular passenger train. 'Where a drover is riding on a pass on a freight train the carrier is not bound to the same absolute or extraordinary degree of care as to his safety as it is to a passenger for hire riding pursuant to a ticket on regular passenger trains, for it is impossible for the company to care as well for a person riding on an ordinary freight train as it is for one riding on a regular passenger train'

(*4 Elliott on Railroads, sec. 1606*). This proposition is self-evident. The risks and dangers are much greater and more numerous upon a freight than upon a passenger train, and the same precautions in the way of running the former and in constructing the cars used therein that are necessary in respect to the latter cannot, in the very nature of things, be observed. This is a condition which every one who rides upon a freight train must be held to appreciate and understand (*Chic. & Alton R. Co. v. Arnold, 144 Ill., 270-272*). In section 1629, *4 Elliott on Railroads*, the author, after speaking of the degree of care which a carrier owes its passenger, proceeds: 'But we do not mean that its duties and the precautions it must take are absolutely the same with respect to the operation of (freight) trains as with respect to regular passenger trains. As to its road-bed, bridges and the like, it would seem that the duty is absolutely the same, but it is obvious that the risk is greater in riding upon freight trains, that the same appliances cannot be used and that the same speed and comparative freedom from sudden jerks and the like cannot be attained. The duty of the company is therefore modified by the necessary difference between freight and passenger trains and the manner in which they must be operated, and while the general rule that the highest practicable degree of care must be exercised holds good, the nature of the train and the necessary difference in its mode of operation must be considered, and the company is bound to exercise only the highest degree of care that is usually and practically exercised and consistent with the operations of trains of that nature. In the operation of freight trains, the primary object is the carriage of freight, and the appliances used are, and are known by the passengers to be, adapted to that business, and the carrier is not, when transporting passengers thereon, held to a degree of care in its operation that would destroy the use of the train for its primary purpose.' "

And in 2 Hutchinson on Carriers (3d ed.), section 1003, page 1157, the law relating to persons traveling on "drovers' passes" is expressed as follows:

> "He is only a passenger, however, in a restricted and modified sense, for he assumes such risks and inconveniences as necessarily attend upon caring for his stock and as are characteristic of the vehicle upon which he is carried. To the extent that such risks and inconveniences interfere with the operation of ordinary rules of liability, the duty of the carrier is accordingly modified."

A drover traveling on a free pass is in effect a passenger for hire, but cannot recover for an injury sustained through the railway company's negligence by reason of his being on top of a cattle car, although he was instructed by a station agent to ride there instead of in the passenger car, the agent having no authority in the premises and the persons in charge of the train being ignorant that he was in that position.

> Little Rock & Fort Scott Ry. *v.* Miles, 40 Ark., 298; 48 Am. Rep., 10.

Where the plaintiff voluntarily assumed a position of danger, even though he was a passenger of the defendant company, no presumption of negligence on the part of the defendant can arise from the mere receipt of the injury.

> Metropolitan R. R. *v.* Snashall, 3 App. D. C., 420.
> Weaver *v.* Railroad Co., *supra.*
> McAfee *v.* Huidekoper, 9 App. D. C., 36, 40.
> Harbison *v.* Railroad Co., 9 App. D. C., 60, 67.
> Brightwood Ry. Co. *v.* Carter, 12 App. D. C., 155.
> Kohner *v.* Capital Traction Co., 22 App. D. C., 181.

In McAfee *v.* Huidekoper, *supra,* it was held:

> "The passenger who passes from car to car under ordinary circumstances, when the train is in motion, takes the ordinary risk that may attend the act; and

> if hurt in so doing, he must show, in order to recover, that his injury resulted from some act of negligence on the part of the defendant. * * * No presumption of negligence can arise from the mere receipt of injury under such circumstances."

And in the Kohner case, *supra,* it is clearly shown that it is not the *injury,* but the *manner and circumstances* of the injury, that justify the application of the maxim *res ipsa loquitur.*

The only evidence in any way tending to show negligence on the part of the defendant in the case at bar is the unsupported testimony of the plaintiff that he examined the bolt of the hasp *after* the accident, and there was no nut on it and it was rusty, whereas all of the other evidence upon this point tends to show that the defendant had the car duly inspected, and that it was in good condition when it left Washington. Under his contract the plaintiff agreed "to inspect the body of the car or cars in which said stock is to be transported and satisfy himself that they are sufficient and safe and in proper order and condition," and there is no evidence that he made any complaint as to the condition of the car before it left Washington. It is therefore more than probable that the plaintiff himself caused the nut to come off of the bolt during the journey, since he testified that it was his habit to board the car by catching hold of this hasp. The fact that the bolt was rusty has no bearing upon the case, because it is a well-known fact that, in the nature of things, such a bolt often becomes rusty while the nut is on it, and even if this were not so, there was ample time for rust to form on the bolt during the two days' journey after the nut had been worked off by the plaintiff constantly and improperly using the hasp as a hand-hold, or by the ordinary jars incident to the transportation.

The plaintiff's duty under his contract was to examine the bolt, hasp, and every other portion of the car *before* starting on his journey, and if he failed to do so, as the evidence indicates, and received an injury which might have

been prevented had he made such inspection, he was guilty of contributory negligence which should bar any recovery in this action.

In the case of Patton *v.* Texas & Pacific Ry. Co., 179 U. S., 658, the court affirmed the action of the trial justice in directing a verdict for the defendant, Mr. Justice Brewer describing the circumstances of the case as follows:

> "The single negligence charged is in the failure to have the engine step securely fastened. That step, a shovel-shaped piece of iron, is firmly fixed to a rod of iron about an inch in diameter and eighteen inches in length, which passes up through the iron casting at the rear of the engine, about six or eight inches thick. A shoulder to this rod fits underneath the casting and the part passing through above has threads on the upper end upon which a nut is screwed firmly down on the casting, fastening the rod so that it will not move. That the step, rod and nut were in themselves all that could be required is not disputed. That the nut was properly screwed on at El Paso, before the engine started on its trip, is shown, the plaintiff, who assisted there, testifying to the fact. The engineer testified that he used the step both on the trip to Toyah and the return trip to El Paso and found it secure, and there is nothing to contradict this evidence. The engineer in his report of needed work both at Toyah and on his return at El Paso did not mention the step. He certainly supposed it secure. Competent inspectors were provided by the company both at El Paso and Toyah, and neither of them detected any failure in the secure fastening of the step by the nut. All of the witnesses except the superintendent and foreman of defendant testified that if the nut had been securely fastened at El Paso it would not have worked loose in making the trip from El Paso to Toyah and return by the ordinary jar and running of the engine; that it might be loosened by the step striking something. The superintendent and foreman testified, from an experience of twenty years with engines, that it might work loose on such trip, but that it was impossible to tell whether it would or not. * * * At the first trial he [round-

house foreman] testified that the step was not taken off at Toyah. In the last that it was. He also testified that though taken off it was securely fastened before the train left."

The court held:

"It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Followed in Butler *v.* Frazee, 25 App. D. C., 392.

2. The court did not err in directing a verdict for the appellee, because the appellant assumed the risk of the dangerous position he voluntarily occupied when he used the hasp of the door for an unwarranted purpose.

This hasp, which the evidence shows was on the car for the sole purpose of locking the door, was constructed so as to stand a heavy horizontal strain, but was not designed or intended to support an outward pull such as the appellant must have given to it in his attempt to board the car. This will appear from an examination of the blue print offered in evidence in the court below and which counsel agreed to

submit to this court for inspection. When the plaintiff used this hasp for a purpose for which it was not intended he assumed the risk of the perilous position he thereby occupied, and the defendant should not be held responsible for the accident resulting therefrom.

Counsel for the appellant have sought to distinguish the case of McCauley *v.* Southern Ry. Co., 10 App. D. C., 560, from the case at bar on the grounds that in the McCauley case (1) the plaintiff was an employee, (2) that the plaintiff used a number plate for a handhold when handholds were provided, and (3) that the number plate was clearly unsuitable for the purpose of a handhold. None of these distinctions are, however, well founded, because (1), it having been shown that the doctrine of *res ipsa loquitur* does not apply to this case, the plaintiff stood practically in the place of an employee with respect to the burden of proof being upon him to affirmatively show negligence on the part of the defendant, and in the later case of Brightwood Ry. Co. *v.* Carter, 12 App. D. C., 155, the plaintiff was a passenger, and this court approved of language similar to that used in the McCauley case: (2) because it is distinctly said in the McCauley case that the engine in question was of an old type, which did not have handholds in front, where the plaintiff was injured, and the plaintiff himself testified that the number plate was the only thing to which he could catch hold for support; and (3) the hasp in this case was no more suitable for the purpose of a handhold than the number-plate was in the McCauley case. It does not appear that any person other than Blatcher used this hasp as a handhold, while in the McCauley case, McCauley himself testified that he, an experienced railroad man, had frequently used the number-plate as a handhold. It cannot be denied that the reasoning of every sentence of the following quotation from the McCauley case is in point with the case here under consideration:

> "Defendant was clearly not liable (and this counsel for plaintiff concede) for its failure to have a

hand-rail across the front end of the engine; for if this was a defect no one knew it better than plaintiff, and he had not raised or found an objection to it. He rests his case, therefore, on the defective fastening of the number-plate, which he claims to have used as a substitute for the hand-rail. But, as we have seen, this number-plate was not a necessary or working part of the engine. It answered a separate and distinct purpose, namely, to show the number of the engine, that it might be readily recognized. It was screwed on to the engine head, so as to be readily removable in case of desired change. Plaintiff knew its purpose and had often polished it, though he says he did not know how it was secured. It did not break, but the screw simply turned under the weight of the plaintiff as he pressed upon one side of the plate. There is nothing tending to warrant an inference that the plate was not sufficiently secured for all the purposes that it was intended to serve by the maker and the owner of the engine. Plaintiff's use of it as a substitute for a hand-rail in passing over the pilot could not convert it into an appliance furnished for that purpose, unless that use was with the knowledge and the express or implied consent of the defendant. Now, whilst he says that he often used it in that way, there is not one particle of evidence tending to show that such use was known to, much less encouraged or acquiesced in by, the defendant. It would be a harsh and unreasonable rule of law that would permit an employee, without the knowledge of his employer, to make use of an appliance wholly foreign to the purpose that it was designed to serve, and thereby make the employer liable to him because it may have proved inadequate and unsafe for the new, unauthorized and unknown use."

In the Carter case, *supra,* the plaintiff was a passenger, who was injured because a handle-bar, to which he was holding for support, gave way when the car gave a sudden lurch, the evidence showing that the handle-bar was merely intended to assist persons in boarding and alighting from the car. The trial justice instructed the jury as follows:

"If the jury find that the plaintiff on July 12, 1896, boarded the defendant's open summer electric motor car at Brightwood to ride into Washington and stood upon the footboard, and there paid his fare to the conductor, and remained upon the footboard instead of entering the car, where, as the plaintiff knew, there was standing room (if the jury so believe), and that the plaintiff, while the car was going, stood upon the footboard and held onto the *handle-bar instead of holding onto the upright post of the car* to which the handle-bar was attached, the jury are instructed that the plaintiff thereby assumed the increased risk of riding in such exposed position; and if the jury further find that, while so situated, the plaintiff received the injury from the accident as shown in the evidence, the jury are further instructed that before the plaintiff is entitled to recover, the jury must by a fair preponderance of the evidence further find that the said accident was caused in whole or part by some negligent act of the defendant. There is no presumption of negligence from the mere happening of such accident to the plaintiff under such circumstances, if the jury so find them.

"If the jury find that the plaintiff rode standing upon the footboard instead of seeking a safer place to stand, inside the car, and that he held onto the handle-bar instead of to the upright post of the car, and that before and about the time of the accident sued for in this action he swung outward from the car while in motion; and if the jury further believe from the evidence that the handle-bar was a convenience afforded to the public to aid them in boarding and alighting from the car, and that the one in question was stable and firm enough for all such uses, but that the plaintiff by his swinging outward from the car while it was in motion subjected said handle-bar to an extraordinary strain, which wrenched it from its fastenings to the post, and that thereby the plaintiff received the injury sued for, and that all the while the car was propelled and managed with proper caution and ordinary care, the jury are instructed that the plaintiff's want of care contributed to his injury, and the plaintiff is not entitled to recover."

Commenting upon the above, the present Chief Justice, delivering the opinion of this court, said:

> "Taken as a whole, the charge is just and fair and in strict application to the facts undertaken to be proved in the prosecution and defense."

In the recent case of Quirouet *v.* Alabama, etc., R. R., 18 Am. & Eng. R. Cas., N. S., 551, a master-and-servant case, the court stated the facts as follows:

> "When the plaintiff attempted to mount the car, it was necessary for him to take hold of a large standard, which was on the car for the purpose of preventing the pipes with which the car was loaded from rolling off, and place his foot upon the journal box, and in this way mount. The standard was so large that he could not grasp it, but was required to throw his hand and wrist around it, and as he did so, and placed his foot upon the journal box, and threw his weight on the standard, it turned with him, threw him down, and threw his foot off the journal box under the wheels of the car, which passed over his ankle, foot, and leg, and caused him to sustain painful and serious injuries. The socket in which the standard worked was square, and the standard was round, and not properly fitted in it, or it would not have turned. The plaintiff further testified that it was the custom of the employees to mount the car in the way he sought to do, but there was no evidence showing that the company knew of this custom and assented to it."

And the Supreme Court of Georgia unanimously held:

> "It is a general rule of law that a servant cannot recover of the master for injuries resulting from the use of machinery or appliances for a purpose for which they were not intended by the master and for which it was not necessary that they should be used, however defective such appliances may be. In undertaking to use an appliance for a purpose for which it was not intended by the master, the servant takes upon himself the risk incident to such use. * * *

> We think there is no possible view of the case which would have justified a recovery for the plaintiff, but that his injuries were the result of his own gross negligence in the premises. There was therefore no error in directing the jury to return a verdict in favor of the defendant."

In Dixon *v.* Western Union Telegraph Company, 68 Fed. Rep., 630, the plaintiff, an employee of the defendant, had climbed a telegraph pole in the performance of his duties, and while descending, one of the spikes, which had been driven in the pole for the purpose of a handhold, pulled out and he fell to the ground. The court sustained a demurrer to the declaration, saying:

> "He (plaintiff) had all the opportunity which any inspector could have had to know whether the spikes had been driven into the pole securely, or whether the wood had become rotten and decayed. He learned, or might have learned, when he went up the pole, whether or not the spikes were securely fastened in the wood. He saw and used them in going up, and a careful inspection, to insure his personal safety was the first thing which ought to have been suggested to him. * * * He was a man of mature age and needed no instruction to warn him of his danger or his duty. He knew that no one knew the condition of the pole or the spikes better than he did, and that no one could know better than he the sufficiency of the spikes to bear his weight. If he gave the matter a thought, he knew that he must rely upon his own judgment in placing his weight upon the spikes, and that before doing so he ought to test them, to see if they were sufficiently secure to trust his weight upon them. Under such circumstances he had no right to rely on the judgment or inspection of his foreman."

In the case of Railroad Company *v.* Chapman, 26 App. D. C., 472, cited by counsel for the appellant, the facts were not undisputed, the court distinctly saying, "On all material points there was conflicting testimony" (p. 477). In the

Chapman case this court also approves of the following language, which it quotes from the case of Harbison *v.* Metropolitan R. Co., 9 App. D. C., 60, 69:

> "The true rule must be that, whilst a passenger may ride on the platform, step, or footboard of a car, with the express or implied consent of the carrier, without incurring the imputation of contributory negligence as matter of law, he thereby, however, *assumes the increased risk* that may result therefrom in the ordinary course of things when the car is properly driven or managed. If hurt during the period of this exposure, he must, in order to recover, *show affirmatively* that the accident was caused in whole or in part by some negligent act of the carrier."

In the recent case of Jennings *v.* Railroad Company, 29 App. D. C., 219, upon which counsel for the appellant also rely, the court held that the defendant was guilty of negligence as matter of law, because the testimony of the plaintiff to the effect that defendant's employees had violated certain rules promulgated to promote safety in the operation of the railroad was uncontradicted by the defendant; but on the second trial of that case in the lower court, when the rules in question were produced and it was shown that the plaintiff had not correctly stated them, the trial justice promptly directed a verdict in favor of the defendant. As to the contributory negligence of Jennings, this court admitted that "the question is a close one," but held that it should be submitted to the jury to pass upon the credibility of the witnesses, the weight to be given to their testimony, and the many facts and circumstances of the accident about which there was doubt. This, of course, does not apply to the present case, where there is no dispute as to the facts or as to the credibility of the witnesses.

Counsel for the appellant lay great stress upon the proposition that "contributory negligence is *usually* a fact for the determination of the jury." (Appellant's Brief, p. 9), but in each of the following cases either the Supreme Court of

the United States or this court has approved of the action of a lower court in directing the jury to return a verdict for the defendant upon the ground of contributory negligence of the plaintiff, or has reversed the lower court for not doing so:

B. & P. R. R. Co. *v.* Jones, 95 U. S., 439.
Griggs *v.* Houston, 104 U. S., 553.
Schofield *v.* Chicago, M. & St. P. Ry. Co., 114 U. S., 615.
Aerkfetz *v.* Humphreys, 145 U. S., 418.
Elliott *v.* Chicago, etc., Ry. Co., 150 U. S., 245.
Richmond & D. R. R. Co. *v.* Didzoneit, 1 App. D. C., 482.
Howes *v.* District of Columbia, 2 App. D. C., 188.
Stearman *v.* B. & O. R. R. Co., 6 App. D. C., 46.
Edgerton *v.* B. & O. R. R. Co., 6 App. D. C., 516.
District of Columbia *v.* Brewer, 7 App. D. C., 113.
Wash. & Geo. R. R. Co. *v.* Wright, 7 App. D. C., 295.
Cullen *v.* B. & P. R. R. Co., 8 App. D. C., 69.
Hurdle *v.* W. & G. R. R. Co., 8 App. D. C., 120.
Dashiell *v.* Market Co., 10 App. D. C., 81.
District of Columbia *v.* Ashton, 14 App. D. C., 571.
Sardo *v.* Moreland, 17 App. D. C., 219.
Swart *v.* District of Columbia, 17 App. D. C., 407.
Harten *v.* Brightwood Ry. Co., 18 App. D. C., 260.
Barrett *v.* Columbia Ry. Co., 20 App. D. C., 381.
Stewart *v.* Washington & G. F. E. Ry. Co., 22 App. D. C., 496.
Chunn *v.* City & S. R. Co. of Washington, 23 App. D. C., 551.
Scott *v.* District of Columbia, 27 App. D. C., 413.

There is no evidence whatever tending to show that the hasp was not in proper condition for the purpose for which it was intended; but, if it was defective, the appellant, who had ridden in the car all the way from Washington to Taunton, Massachusetts, had enjoyed a better opportunity of ascer-

taining that fact than any one else, and, as above pointed out, under his contract he was required to inspect the car to see if it was in good condition. The facts in this case are undisputed. It is not denied that the appellant used this hasp for a purpose for which it was not intended, and under the above decisions, having assumed a dangerous position, he cannot hold the appellee liable for injuries received as the direct result of his own voluntary act, and in this case the appellant having failed to use any caution or care for his own safety, his conduct was so reckless as to amount to contributory negligence as matter of law.

3. Under the terms of the contract entered into and signed by the appellant, he is not entitled to recover in this action, because the accident happened beyond the terminus of the appellee's railroad, and the evidence does not show that the car in question was defective when it was furnished to the appellee.

While there are some authorities to the contrary in England, the rule is well settled in the United States that when goods or passengers are to be carried over connecting lines the initial carrier, in the absence of an express agreement to the contrary, is not liable for injury or damage occurring beyond the terminus of its own line.

Railroad Co. *v.* Manufacturing Co., 16 Wall., 318, 324.

Myrick *v.* Mich. Cent. R. R., 107 U. S., 102, 107.

Wabash R. R. Co. *v.* Pearce, 192 U. S., 179.

The act of June 29, 1906 (34 Stats. L., 595), was passed subsequently to the date of this accident, which occurred in May, 1906, and the above statute changed the rule only as to carriers of goods.

In this case not only is there no agreement to the contrary, but the contract between the plaintiff and defendant

expressly says that the horses and man in charge thereof are to be transported "from Washington, D. C., to destination, if on said carrier's line of railroad; otherwise, to the place where said live stock is to be received by the connecting carriers for transportation to or toward destination"; and it is agreed that the place where the accident occurred is beyond the appellee's line of railroad.

Counsel for the appellant seek to evade this provision of the contract by *assuming* that the car was in a defective condition when it was furnished to the appellant in Washington, whereas, as shown above, there is no evidence whatever tending to prove this fact, and the testimony of the car inspector is to the effect that the car was in good condition when it left Washington.

If the car was in good condition when it started on its journey, and became defective *en route*, by reason of the plaintiff swinging on this hasp every time he got into the car, as he said he did, or by the ordinary jarring and shaking of the train during the journey, the defendant is not liable.

Patton *v.* Texas & P. Ry., 179 U. S., 658.

4. The provisions of the contract and release signed by the appellant are reasonable and should operate as a bar to this action.

The declaration, or bill of particulars, filed by the plaintiff below reads as follows:

> "To damages sustained by plaintiff by reason of defendant's negligence in *furnishing* insufficient and defective car to transport plaintiff, his horses and carriages, from Washington, D. C. to Newport, Rhode Island, as *per contract* of May, 1906 ..... $300.00"
>
> (R., 1.)

and the contract therein referred to, which was signed by the plaintiff and offered in evidence by him at the trial of the case in the court below, contains the following clauses:

> "That whenever the person or persons accompanying said stock under this contract, to take care of the same, shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier nor its connecting carriers shall be required to stop or start their trains of caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock, to take care of the same under this contract.
>
> "And it is further agreed by said shipper, that in consideration of the premises, and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers, without charge other than the sum paid or to be paid for the transportation of the live stock, in charge of which he is, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employees, or otherwise."

Upon the back of the contract the following release was printed, which was also signed by the appellant:

> "In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock —— in charge, the undersigned does hereby voluntarily assume all risk of accidents or damage to his person or property, and

> does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise."

The case of Railroad Company *v.* Lockwood, 17 Wall., 357, is in many respects similar to the case at bar, and counsel for the appellant will probably urge that, under the decision in that case, the above release should be held to be invalid. The first conclusion reached by the court in the Lockwood case is "that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not *just and reasonable* in the eye of the law." There is no doubt that the contract there construed was unjust and unreasonable, because the court says (p. 358) "the agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms," and at page 379 the court says: "Of course, no drover could afford to pay such tariff rates."

In this case the appellant does not contend, and there is no evidence to show, that the alternative rate referred to in the bill of lading was exorbitant or unreasonable, but the shipper accepts the contract "upon the following terms and conditions (*i. e.,* the terms above quoted), which are admitted and accepted by the said shipper as *just and reasonable.*" The Lockwood case expressly holds that where the contract is *reasonable* its provisions will be upheld, and at page 380 the court says:

> "Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon

> their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; * * * and when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence the exemptions referred to were deemed reasonable and proper to be allowed."

The second conclusion in the Lockwood case is "that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants," the court making no distinction between carriers of passengers and carriers of goods; but there is no doubt that this proposition has been greatly limited in effect by more recent decisions of the same tribunal.

> Hart *v.* Penna. R. R. Co., 112 U. S., 331.
> B. & O. S. Ry. *v.* Voigt, 176 U. S., 498.
> Northern Pac. Ry. Co. *v.* Adams, 192 U. S., 440.
> Boering *v.* Chesapeake Beach Ry., 193 U. S., 442.
> Cau *v.* Texas & Pac. Ry., 194 U. S., 427.

In the Voigt case, *supra,* an express messenger was injured by reason of the negligence of the railway company. Between the railway company and the express company there was an agreement, under the terms of which the latter

agreed to save the former harmless in the event that any of the express company's employees should receive injuries as a result of the negligence of the railway company. At the time Voigt entered the employment of the express company he signed an agreement to assume the risk of all accidents and injury he might sustain in the course of such employment. The plaintiff was hurt in a collision between two trains of the railway company, where it would seem the negligence of the defendant was unquestioned, and the court held that he could not recover, saying that he had entered into the contract "fairly and voluntarily," and that such a contract did not contravene public policy. Referring to the Lockwood case, the court remarks in the Voigt case (p. 505):

> "The principles declared in these cases are salutary, and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

In the case of Cau *v.* Texas & Pacific Ry. Co., *supra,* the court holds:

> "It is well settled that the carrier may limit his common law liability (York Co. *v.* Central Railroad, 3 Wall., 107). * * * Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper (New Jersey Steam Navigation Co. *v.* Merchant's Bank, 6 How., 344), and there can be no stipulation for any exemption by a carrier which is not just and

reasonable in the eye of the law (Railroad Co. *v.* Lockwood, 17 Wall., 357; Bank of Kentucky *v.* Adams Express Co., 93 U. S., 174).

"Inside of that limitation, the carrier may modify his responsibility by special contract with the shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed."

In the case of Porcher *v.* Railroad Company, 49 N. Y., 263; 10 Am. Rep., 364, the plaintiff was injured while traveling on a "drover's pass" similar to the one here under consideration, and the court held "we are of opinion that, under the contract between the plaintiff and the defendant, the latter was exempted from liability for the injury sustained by the plaintiff and the negligence of its servants, and that the motion for a nonsuit on that ground should have been granted," and this doctrine was approved in the case of Bissell *v.* Railroad Co., 25 N. Y., 442; 82 Am. Dec., 369, which was followed by the New York courts after the decision in the Lockwood case in Mynard *v.* Syracuse, etc., R. R. Co., 71 N. Y., 180; 27 Am. Rep., 28.

The appellant fairly and voluntarily signed this contract and release; the contract distinctly states that he had the alternative of paying a slightly higher rate and obtaining the full protection of the carrier's common-law liability, although under the decision in the Cau case, *supra,* the carrier is not bound to offer him such an alternative. The appellant at the time he signed the contract did not complain of its terms as being unreasonable and unjust, and it is the settled law of this court that releases fairly and voluntarily entered into are valid and will be upheld.

Brown *v.* B. & O. R. R. Co., 6 App. D. C., 237.
Lyons *v.* Allen, 11 App. D. C., 543.
C. & O. R. R. Co. *v.* Howard, 14 App. D. C., 262.
Rockwell *v.* Capital Traction Co., 25 App. D. C., 98.

Upon the whole case, it is respectfully submitted that the judgment of the Supreme Court of the District of Columbia should be affirmed.

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